United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7251

To be argued by
JOSEPH W. HENNEBERRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

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EUGENE S. PAPELYEA, :

Plaintiff-Appellant, :

-against- :

THE NEW YORK STATE SUPREME COURT and THE NASSAU COUNTY BOARD OF SUPERVISORS, :

Defendant-Appellees. :

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BRIEF FOR DEFENDANT-APPELLEE NEW YORK STATE SUPREME COURT

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BRIEF FOR DEFENDANT-APPELLEE
NEW YORK STATE SUPREME COURT

Questions Presented

1. Is the appeal moot?

2. Was the District Court correct in holding that the modified weighted voting plan of the Nassau County Board of Supervisors did not violate appellant's constitutional rights?

Preliminary Statement

This is an appeal from a memorandum and order of the United States District Court for the Eastern District

of New York (Platt, J.) dated March 31, 1976 dismissing appellant's complaint as to the New York State Supreme Court for mootness and finding that the weighted voting plan of the Nassau County Board of Supervisors (hereinafter "Board") did not suffer from any constitutional infirmity.

Prior Proceedings

Appellant commenced this action in the Eastern District of New York in October, 1975. Appellant sought to enjoin the implementation of a districting plan and the use of a weighted voting plan in Nassau County that were to appear on the ballot in November, 1975. Appellant argued that the districting plan, known as the "Liff Plan", which proposed a fifteen member county legislature to be elected from fifteen single member districts of nearly equal population with a variation no greater than ten percent, would be improper unless it included certain census tracts designated by the appellant to be a district with a "cognizable racial element." Appellant stated that failure to include these census tracts as a district would be

"sophisticated gerrymandering" and violative of the 14th Amendment. As to the weighted voting plan, appellant argued that weighted voting in any form was inconsistent with the principle of one man, one vote. Both voting plans that were to appear on the ballot, appellant continued, were violative of his constitutional right to equal protection of the law (see appellant's complaint, paragraphs 2, 3, 6, 19 and 21).

Appellant obtained an order requiring defendants to show cause why the New York State Supreme Court should not be required to draw up a plan which included appellant's suggested district; why election of candidates should not be enjoined until such plan was prepared; why the districting plan should not be stricken from the ballot until it included such plan; and why the weighted voting plan should not be stricken from the ballot. The District Court reserved decision pending the outcome of that November election.

At the election, the voters approved the modified voting plan, thereby making appellant's challenge to the

"Liff Plan" moot. The District Court dismissed that part of the complaint as to defendant New York State Supreme Court since the election results had made the issue moot.

Appellee New York State Supreme Court, in its answer of November 3, 1975, also argued to the District Court that the Court lacked personal jurisdiction pursuant to FRCP (12)(b)(2); subject matter jurisdiction pursuant to FRCP (12)(b)(1); that the New York State Supreme Court was not a "person" within the scope of 42 U.S.C. § 1983; that the appellant failed to state a claim upon which relief could be granted pursuant to F.R.C.P. (12)(b)(6); and that appellant was seeking to relitigate a matter already decided by the state courts contrary to federal-state comity. The court below, in light of the election results, did not consider it necessary to discuss these other issues. The District Court did, however, go on to consider the constitutionality of the weighted voting plan now in effect and found no infirmity there since weighted voting has not been held to be in and of itself unconstitutional and since the deviation in the current plan would be no more than 7.3%. The plan had been adopted in good faith and received the approval of the voters of the County.

Background

In Franklin v. Mandeville, 26 N Y 2d 65 (1970), the New York State Court of Appeals declared that the weighted voting plan of the Nassau County Board of Supervisors, then in effect, violated the "one man, one vote" principle since no town supervisor would be entitled to cast more than 50% of the vote of the board. The Town of Hempstead held 49.6% of the board's vote, while its population constituted 57.12% of the county's population. Reapportionment was directed after the Federal census of 1970.

In September, 1972, the board adopted a local law providing for a new weighted voting system. This plan was held to meet the "one-man, one-vote" requirement. Franklin v. Krause, 32 N Y 2d 234 (1973). The Court of Appeals held that the new plan allowed for a range of deviation of only 7.3%. This new plan was developed after computer analysis and provided for 130 votes to be distrubuted among six supervisors. The Town of Hempstead, with two supervisors having 35 votes each, had a total of 70 votes. However, the plan held that for issues requiring a

majority vote, 71 votes not 66 were required. Although this plan also to an extent disenfranchised Hempstead, the Court of Appeals, in light of the case of Abate v. Mundt, 403 U.S. 182 (1971) found that plan to be acceptable for a local form of government in view of its slight deviation rate. Abate held that a maximum deviation rate of nearly 12% was not inherently unconstitutional.

This plan was submitted to the voters of the county in November 1974 and rejected. In June 1975, a 15-district plan approved by the New York State Supreme Court (Franklin v. Krause, 83 Misc. 2d 42) was also rejected by the voters.

A judicial commission was then appointed to devise a plan. The commission's plan called for 15 legislative districts, the legislators to be elected in the November 1975 election (The "Liff Plan").

At this point plaintiff-appellant brought a proceeding under Article 78 of the CPLR to compel the Board to construct a district out of census tracts comprised of a minority population of "Black and Spanish speaking residents." His petition was dismissed (Rapelyea v. Nassau

County Board of Supervisors, 367 N.Y.S. 2d 1005 [1975]). The court refused to intervene since appellant had failed to make a factual showing that the voting power of any minority group had been diluted in violation of the one man, one vote principle. Petitioner appealed to the Court of Appeals but then decided to withdraw.

Both the "Liff Plan" and a modified weighted voting plan were before the voters in November 1975 (Franklin v. Krause, 37 N Y 2d 813 [1975] aff'g 83 Misc 2d 42). The voters selected the weighted voting plan.

Appellant now argues, at this late date, in his brief to this Court, that the matter should be remanded to the New York State Supreme Court and a "special election" should be held utilizing the "Liff Plan" modified to include his census tracts.

POINT I

THE ISSUE ON APPEAL IS MOOT.

The voters of Nassau County have finally decided an issue that has been through the state courts on a number of occasions. The appellant, after abandoning his appeal to the state court on the same issue brought in the District Court, now asks for a new election using his version of the

"Liff Plan" that had been defeated in the November 1975 election. Appellant again fails to show a factual basis that the districts were so physically contrived as to invidiously cancel out or minimize the voting strength of specific ethnic or racial groups. White v. Register, 412 U.S. 755 (1973). The state courts have already acted according to the mandates of the United States Supreme Court. The appeal of Franklin v. Krause, 32 N Y 2d 234, holding the proposed weighted voting system in Nassau County constitutional was dismissed by that Court (415 U.S. 904 [1972]).

The equities clearly lie with the appellees. The state courts have acted on reapportionment, the voters have spoken and the issue is moot. The appellant, who had deliberately abandoned his state remedies, cannot now ask for a new election. Appellant has not met his burden of proving that certain districts operate unconstitutionally to dilute or cancel the voting strength of racial or political groups. Whitecomb v. Chavis, 403 U.S. 124 (1971). The appellee New York State Supreme Court has acted properly and there is nothing left for it to do.

POINT II

THE WEIGHTED VOTING SYSTEM IN EFFECT IS CONSTITUTIONAL.

There is no case holding that weighted voting is in and of itself unconstitutional. Weighted voting must still comply with the principle of one man, one vote. Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964). Deviations from population equality must be justified by legitimate state considerations. Swann v. Adams, 385 U.S. 440 (1967).

However, viable local governments may need considerable flexibility, Sailors v. Board of Education, 387 U.S. 105 (1967), and desires to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. Reynolds v. Sims, supra, at 578.

Slightly greater percentage deviations may be tolerable for local government apportionment schemes. The needs of a local community may justify departures from strict equality providing that the plan does not contain a built-in bias favoring a particular political interest or geographic area. Abate v. Mundt (supra - variance of 11.9%).

There is no such indigenous bias in the Board's Plan. The District Court found that the plan was adopted in good faith. Appellant does not contend that there is any built-in bias in this plan. Thus, the District Court properly acted in dismissing appellant's complaint.

POINT III

APPELLANT HAS NO JURISDICTIONAL STANDING BEFORE THIS COURT.

Appellant's complaint in the District Court is devoid of a proper jurisdictional statement. It does not contain any reference to a provision of the United States Code which would confer jurisdiction on this Court. The only basis for jurisdiction which would even be arguable would be 42 U.S.C. § 1983. However, the appellees can not be viewed as "persons" under this provision, Monroe v. Pape, 365 U.S. 167 (1961); Zuckerman v. Appellate Division, Second Department, 421 F. 2d 625 (2d Cir. 1970), and therefore this section also fails as a predicate for exercise of federal jurisdiction herein.

CONCLUSION

THE ORDER APPEALED FROM
SHOULD BE AFFIRMED IN ALL
RESPECTS.

Dated: New York, New York
November 18, 1976

Respectfully submitted,

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State of New York
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants herein. On the 18th day of November , 1976 , she served the annexed upon the following named person s :

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Attorney s in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney s at the address es within the State designated by them for that purpose.

Susan D. Chieco

Sworn to before me this
18th day of November , 197 6

Assistant Attorney General
of the State of New York